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FOREWORD

The *Naval War College Review* was established in 1948 by the Chief of Naval Personnel in order that officers of the service might receive some of the educational benefits available to the resident students at the Naval War College.

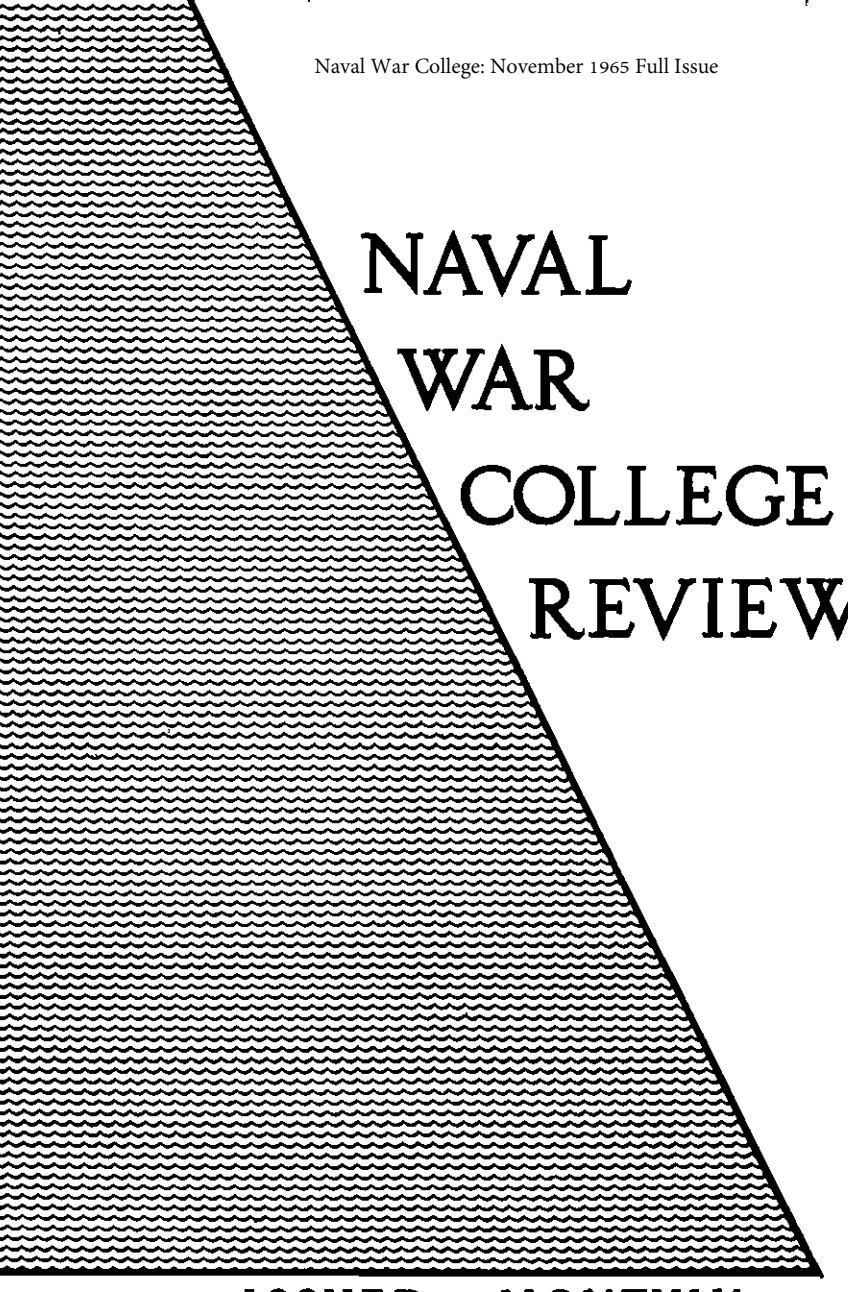
The material contained in the *Review* is for the professional education of its readers. The frank remarks and personal opinions of the lecturers and authors are presented with the understanding that they will not be quoted. The remarks and opinions shall not be published nor quoted publicly, as a whole or in part, without specific clearance in each instance with the lecturer or author and the Naval War College.

Lectures are selected on the basis of favorable reception by Naval War College audiences, usefulness to service-wide readership, and timeliness. Research papers are selected on the basis of professional interest to readers.

The thoughts and opinions expressed in this publication are those of the lecturers and authors, and are not necessarily those of the Navy Department or of the Naval War College.

C. L. Melson

C. L. Melson
Vice Admiral, U.S. Navy
President, Naval War College



NAVAL WAR COLLEGE REVIEW

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THE ANNUAL NAVAL WAR COLLEGE INTERNATIONAL LAW STUDY

Over the years, the Naval War College has become a place of original research on all questions relating to war, to statesmanship relating to war, and to the prevention of war. In the three quarters of a century since the Naval War College was founded, the study of international law has always occupied a prominent place in the curriculum. The study of questions of maritime international law, particularly in the matter of insurgency and the respective rights and duties of neutrals and belligerents, has been accorded even greater importance.

Throughout the years, the conclusions derived from open discussions of questions of international law have been intended primarily for guidance of Naval Officers. Nonetheless, the Naval War College has taken an active interest in the formulation and codification of international law. For example, through the efforts of Captain C. H. Stockton, U.S. Navy, then President of the Naval War College, a Code of Naval Warfare was promulgated in 1900. The Code was prepared under the direction of the Secretary of the Navy, approved by the President of the United States, and published. Foreign sources quickly expressed opinions. The *London Times*, on 5 April 1901, reported that the Code contained a great deal of matter that must surely affect the policy of other nations. Other foreign sources, both private and official, made it obvious that the remarks in the *London Times* represented, in essence, a consensus of opinion in the capitals of the world's leading nations. It was clear that the Code contained provisions upon which there was no current international agreement–provisions which, in the minds of many statesmen, should be studied and evaluated at the international rather than the national level. Because of this world reaction and the fact that the Code, when originally drawn, was intended for presentation to other countries as an international project, the Naval War College, in 1903, recommended that the Code be withdrawn. With the approval of the President of the United States, the Secretary of the Navy revoked the Code on 4 February 1904, in order that United States delegates to any

future Hague couferences on this subject might be unrestrained. Upon revocation, the Code became the basis of instructions to the United States' delegation to The Hague Conference of 1907. Thus it was, near the turn of the century, that the United States Naval War College became a leader in the endeavor to formulate objective opinion on topics relating to the law of maritime warfare.

The Naval War College "Blue Book" series is another example of leadership in the formnlation of international law. This series, the first volume of which appeared in 1901, was established to provide a medium for dissemination to Naval Officers of pertinent educational and informational material in the acutely important field of international field. Fifty-two volumes of this series have now been published; five others are in the process of publication. Throughout the years, this series has grown in importance and has achieved wide recognition as a source of authoritative reference material; it is used extensively by naval decision makers at all levels and has a wide circulation among international lawyers, courts, educational institutions, and law libraries.

Today at the Naval War College, the annual International Law Study includes various readings from a carefully selected bibliography, lectures by distinguished visitors, and seminars or group discussions. The objectives of the Study, from its inception to the present, have been to anticipate the maritime legal situations that may arise; to obtain the fullest information as to the proper course of action in accordance with opinion and known precedent; and to determine the acceptability and feasibility of a given course of action by evaluating the interactions of pertinent legal and military considerations. In the seminars, each of which is presided over by a visiting international law consultant, students present their solutions to hypothetical problems and case situations—problems and situations such as might realistically be faced by a Naval Officer in peace or war. The knowledge thus acquired during the formal study is later applied, and even extended, during the academic year by stndent discussion and consideration of the possible legal aspects of actions inherent in their solutions to various strategic operations problems. This educational technique permits consideration of the impact of a moral concept on military operations and thus serves to develop within the student a proper regard for the increasingly important consideration of international politics and international law in military operations—a consideration which is essential to a well-rounded, knowledgeable leader. The student thus sees clearly and unmistakably that

international law–that body of arbitrary limitations upon the exercise of force in war which civilized peoples have mutually accepted–has a modifying effect on the solution to every strategical problem.

To afford nonresident naval officers an opportunity to gain an understanding of basic principles of international law, the Naval War College instituted a correspondence study in this subject in 1924. This course develops an appreciation of those principles of international law which relates to the organization of the world community and to the relations between nations; it is limited to those aspects of the field which are of direct concern to the military officer. Under continual revision in an effort to reflect new knowledge and current conditions, this correspondence course extends to the nonresident officer, to the maximum degree possible, an opportunity to advance his professional training in the vital field of international law.

A great measure of the success of the Naval War College International Law Studies is attributable to the outstanding work and efforts of a succession of eminent jurists who, from 1885 to the present, have contributed their time and talents to these studies. With each passing year, the list of eminent scholars grows as others contribute their talents to assist in furthering the education of the Naval Officer.

Whether alone at sea or on a staff ashore, today's Naval Officer must know far more than the "Rules of the Road." As a practitioner of international law, he must fully understand the impact of "Rule by Law" and he must be acutely aware of the interdependence of military strategy and international relations. To this end, the *Naval War College Review* will publish each year, an annual issne, devoted to the current thinking and trends in International Law.

THE UNITED STATES NAVAL WAR COLLEGE
INTERNATIONAL LAW STUDY
NEWPORT RHODE ISLAND
25 AUGUST - 3 SEPTEMBER 1965

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Absent from photograph: Prof. E. E. Goldstein, University of Texas; Dean H. C. Dillard, University of Virginia Law School; RADM W. A. Hearn, USN, Judge Advocate General, Navy.

THE INTERNATIONAL LAW OF THE ARMED FORCES ABROAD

A lecture delivered
at the Naval War College
on 26 August 1965

by

Professor Gordon B. Baldwin

My function, as I understand it, is to further your study of international law by supplying specific examples of how it helps, and perhaps hinders, yout work. Your interests are practical and immediate while mine, as a teacher, are academic and more remote. So I run the risk of confirming Mark Twain's remark–"To do good is noble–to teach good is nobler, and no trouble."

Indeed, to practice international law is far more difficult than to teach it. You must respond to the demands of new situations, and the automatic application of old rules doesn't always work. Ancient history (which we find in some of our international law texts–Colombos' volume on the Intetnational Law of the Sea, for example) may be uplifting, but history lacks relevance without knowing how it applies to your problems today. So, we all face a challenge–we, to teach something meaningful, and you, to learn something useful. This works the other way around too–you teach us, and we learn. Indeed, even after six years' experience with the International Law Study, I always come to Newport like the empty coal car coming to Newcastle–hauling away more than I bring in. Your questions, your misgivings, and your commitment to our nation enlighten us and enrich our teaching at home.

I am going to speak to yon of the legal problems of U.S. armed forces abroad as they relate to international law generally. If you're

like your predecessors here at the War College, your immediate reaction to the phrase "international law" is "There's no such thing." Just three years ago, Mr. Katzenbach, now the Attorney General, remarked during this international law study that he didn't see much point in debating the subject of whether international law existed, but that if he did, he'd be happy to debate either side. It all depends, he said, on how one defines law. If Mr. Katzenbach had argued that international law does not exist (and indeed he did not) he would be likely to lose, assuming we define international law in terms of what lawyers do, and if we define international law in terms of the tasks we commonly ask law to perform. In terms of what law does, international law relating to your operations in a foreign country is as real as constitutional law, as criminal law, or as our traffic laws. What jobs does law do? Law, I suggest, fulfills four major functions. Law creates rules for allocating rights to achieve scarce satisfactions. Law, secondly, establishes working presumptions. Third, law offers us a process for minimizing violence by placing in identified hands a legitimate monopoly of violence. It does this by allocating competence to make authoritative decisions and the right to exercise criminal jurisdiction. Fourth, law contributes a sense of legitimacy to those who follow the rules and the presumptions, and also to those who exercise authority. Those who are victims of that authority are more likely to accept it. Let's start by discussing the rules.

A great law teacher and constitutional lawyer, Paul A. Freund, points out that one of the most successful legal inventions we have is the white line drawn down the middle of a highway. Generally motorists keep to the right of that line whether or not there's a policeman and whether or not they encounter traffic. It's the rare motorist who deliberately straddles the line.

International agreements, such as the NATO Status of Forces Agreement, serve much like the white line down the highway. There are no policemen, but the NATO partners follow the rules in the treaty–for the most part avoiding head-on collisions. It has been a remarkably successful agreement, and its form is much imitated –even by the Soviet Union which has Status of Forces Agreements with East Germany and Poland.

In the NATO agreement we have some very precise rules pertaining to passport and visa regulations, driving licenses, uniform regulations, matters of claims, of taxation and of criminal jurisdiction. In the two-year-old Status of Forces Agreement with

Germany, additional rules relate to aerial photography, hunting and fishing rights, use of the roads, port facilities, etc.

We don't *teach* international law, or any other type of law for that matter, by asking you to learn a set of rules. There are too many of them, and reciting them doesn't give a systematic picture. You can have lawyers find them, or you can read the NATO Status of Forces Agreement, the German Supplemental Agreement, the Japanese Administrative Agreement, various base rights agreements, with such countries as Spain, or one of our several naval visits agreements. These answer such questions as:

1. Who commands a jointly nsed installation?

2. What rights of entry to the base area do personnel of the receiving state enjoy?

3. Who can arrest infractors of criminal law? Who can punish their criminal behavior? Does it make any difference if your men were on liberty or on leave when the offense occnrred?

4. Can the U.S. forces arrest or detain local inhabitants who in some manner interfere with the visiting force? What happens when one of your sentries shoots a native of the host country? Can we insist that he only be tried for any alleged offense by a court martial?

5. Can the U.S. send anyone it pleases into the host country—or may the host country exclude Jews or Negroes? Can the host country impose curfew regulations, and prevent yonr men from fraternizing with local girls?

6. What, if any, local taxes should the members of the U.S. forces pay? Income taxes? Inheritance taxes? Taxes imposed to build roads? Radio and TV? Water services?

7. What civil liability does the U.S. force or its members have? Are there any immunities? Who pays for the damage?

8. What flag or flags can be flown?

9. If inhabitants are hired, what provisions, if any, of local labor law must the U.S. follow?

10. Who has authority to negotiate supplementary agreements and what powers are delegated to these persons?

11. Who finances the construction in base areas? Who bears the cost of maintenance and of furnishing utility services?

12. May post exchanges, post offices, commissaries operate? What privileges and duties are applicable to them?

13. Who is responsible for the internal and external security of the area?

14. What are the regulations respecting the use of railroads, roads, dock facilities and airports?

15. Who holds title to fixtures, buildings and other structures constructed for the use of the visiting force?

16. What goods can be imported, in what amounts, and what duties, if any, are payable?

17. How and where can aircraft navigate?

These are only a few of the routine questions answered in some arrangements we have with a receiving state.

Good lawyers know that drafting to meet every contingency is difficult, and they find that to make day-to-day relationships work satisfactorily, detailed drafting isn't a solution. What is more important is to establish procedures and indicate the objectives of settlements that ought to be made. Lawyers on your staff ought to be able to do this.

But lawyers can be troublesome. General Eisenhower thought lawyers were troublesome when, in 1943, he rejected a long, technical draft of an Italian surrender agreement submitted by his staff. He preferred a short, terse surrender agreement leaving many issues between Italy and the allied forces undecided. Some think he was mistaken. However, we have ample evidence that lawyers' documents can be awfully complicated.

So many problems were anticipated in Germany, for example, that the agreements effective there in July 1963 comprise over 200 pages of text. Negotiating lasted nearly 10 years, what with one delay or another, and the result (like the fine print on the back of an insurance policy) is a formidable document, complicated, turgid and legalistic. I suspect it's treated much like the standard clauses in some contracts. Lawyers draft them and the businessmen ignore them. Reading the Germau Supplemental Agreement reminds me of one of the punishments inflicted by Gilbert and Sullivan's Mikado: of the man sentenced to "listen to sermons by mystical Germans who preach from 10 to 4." Perhaps it is too detailed. On the other hand, it's possible also to be too brief. The Japanese Peace Treaty confirming United States presence in Okinawa, for example, states that pending the establishment of some kind of United Nations trnsteeship there, the United States has "all and any powers of administration, legislation and jurisdiction." This is pretty sweeping, but when Secretary of State Dnlles remarked thereafter that, of course, Japan retains "residual sovereignty" over those islands, we authorize Japan's flag to be flown there and refrain from mounting araid on Viet Nam from there. This only adds confusion. Admittedly another treaty clarifying United States' rights in the Ryukyu Islands would be difficult to negotiate. Maybe it's too late. However, the existing situation permits Japanese to complain that their residual sovereiguty is violated when occasionally we find it necessary to use Okinawa as a base for B-52 raids over Viet Nam. My point is that more detail and less sweeping language in the Peace Treaty might have been in United States national interests.

Now let's note a second function of law, one more difficnlt to grasp, but more important; namely, its use to establish working presumptions. Law in any form and in every society performs a major service by establishing presumptions which shift the burden of persuasion by suggesting that some values ought to be preferred. We have many examples, it's presumed a crime to intentionally kill another nnless you can establish some justification; the oceans are presumed free for all users, unless one of the users can establish very good gronnds for excluding others. In our topic today the basic presumption seems to be that: the military or naval force entering a foreign country is presumed subject to local law and is subject to the exercise of local enforcement authority unless it can establish some good grounds for exemption.

Law also supplies the machinery by which presumptions can change, and indeed it has changed here. In the 18th and 19th

centuries visiting military forces in foreign countries were probably presumed exempt from the host country's authority. They were treated almost like diplomats. We have a famous old Supreme Court case articulating this presumption–the *Schooner Exchange*. But a lot has happened since 1812 when Justice Marshall rendered that decision. Foreign armies are no longer sporadic guests (our forces have been in Europe for over 20 years). Nationalism generates resentment against granting vast immunities to the visitors. The trend in international law is to inhibit anything that might be characterized as aggression and to encourage accountability for all official acts. Moreover, persistent Communist propaganda would have the world believe our forces are engaged in a military occupation of Japan, Western Europe, and the Philippines. All these conditions have contribnted to developing a different presumption. When the NATO Alliance was being organized, both we and our allies wanted to make it absolutely clear that United States armed forces in friendly foreign countries were there as allies, not occupiers; that we were partners with the host country in a joint enterprise, namely: the defense of Europe. Hence the presumption of immnnity from the exercise of local authority, which we claimed during World Wars I and II, was changed by international legislation, rhe NATO Status of Forces Agreement. The Supreme Court of the United States in the 1957 *Girard* case confirmed the new doctrine in holding that members of United States forces in foreign lands are subject to the enforcement procedures of local territorial law, unless some specific international agreement or some specific rule of international law holds otherwise.

It seems to me that many of ns have mistaken this presumption, expressed in several other treaties, for an absolute rule. Indeed, when the NATO Status of Forces Agreement was submitted to the U.S. Senate for its advice and consent, the Secretary of Defense and the Secretary of State solemnly declared that the agreement merely recited general international law in that the host conntry always retains territorial jurisdiction over the visiting United States force. More recently, I read a statement by an Army lawyer that the marines landing in Thailand a few years ago to help defend that country's border with Laos were subject to the enforcement jurisdiction of Thailand. This is a little hard to believe as it jnst doesn't make sense for a combat force, hastily admitted in an emergency, to have to submit to the risk that a local law enforcement agency will arrest members of the force for alleged criminal behavior. The suggestion of amenability to local law that we find in the NATO agreement, and in many others, is just

that: a presumption which may be, and has been, rebutted on several occasions.

Underlying each international agreement establishing a legal basis for our forces abroad are one of four different conditions, and to meet them the working assumptions articulated in law must, and do, vary. Let's look at the four:

I. The Peacetime Garrison situation, typical in Europe, Japan, and Australia: Here the supremacy of local law reflects reality. The visiting force is amenable to local civil and criminal law and to its enforcement unless the treaty indicates exceptions which usually relate to activities done in the course of *official duty*—not always an easy question to determine. In a peacetime or garrison situation, the visiting force does not require absolute immunity. They do require some assurance of what procedures and rules should be followed in the event of disputes, tax claims, criminal behavior, etc. And the host country can rightly insist that even if the visiting force is immune from certain enforcement jurisdiction that the force should nevertheless obey local law.

II. Where the visiting force functions as if they were diplomats: The agreement of Viet Nam, negotiated in 1950-51, for example, provides for U.S. military assistance, largely in the form of supplies and equipment, but it also covers people who might come to Viet Nam to help. These people "operate as part of the Diplomatic Mission" of the United States, and they are therefore entitled to one of three categories of diplomatic immunity. The agreement, between the U.S., France, Cambodia, Laos and Viet Nam, negotiated in 1950, hardly seems relevant today particularly in view of our undertaking that the number of persons receiving these privileges "will be kept as low as possible."

Diplomatic immunity is a valuable privilege intended to enhance international communication. Its nature is well established by treaty and custom, but it can be waived, as it was in the recent unhappy Kimball episode in Viet Nam. Moreover, diplomatic immunity does not give its holders a license to flout local law. In fact, the modern trend is to require diplomats, like anyone else, to obey local law. Although they are exempt from local enforcement procedures, they run the risks of expulsion or being inconvenieuced. New Jersey claims the right to escort speeding diplomats off its toll roads, and I understand that the State Department is insisting that diplomats should follow traffic and parking regulations.

Obviously the draftsmen of the Viet Nam agreement did not contemplate our sending 100,000 armed-to-the-teeth diplomats. Nevertheless, so far as I can determine, this is the only agreement published covering any of our forces there. To presume that they are not only subject to local law, but also the exercise of local enforcement jurisdiction, is absurd. The facts are that our forces are engaged in combat. What presumptions apply then?

III. The combat situation: A few weeks after the North Korean invasion of 1950, we negotiated a one-page agreement with South Korea stating that the United Nations forces there were exempt from arrest and trial by Korean authorities. Surely this agreement merely articulated a preexisting presumption of immunity. The agreement goes further, however–there's a curious provision stating that "unless required by the nonexistence of local courts, courts of the United States forces will not try nationals of the Republic of Korea." Does this mean that the United States might claim the right, in the absence of a functioning host country judiciary, to subject local inhabitants to trial by court-martial or military commission? This raises some interesting questions involving the interplay of the laws of war, the Geneva conventions and of the United States Constitution. We can make a case for that power, but I personally doubt whether that argument would be sustained by the Supreme Court today, The *Yamashita*[1] Case, *Madsen v. Kinsella,*[2] to the contrary notwithstanding. Perhaps my colleagues could grapple with that problem. It may be a real one in view of the fourth situation.

IV. The "Quasi-combat" or "peace-keeping" situation.

I don't know how else to characterize the legal status of our forces in the Dominican Republic. Heretofore, foreign armed forces

[1]*In Re Yamashita*, 327 U.S. 1 (1946), involved the war crimes trial of Gen. Yamashita for certain massacres and atrocities committed by Japaneee forces under his command during World War II. The Supreme Court of the United States held that the United States Military Commission in Manila had jurisdiction to try Gen. Yamashita for those war crimes.

[2]*Madsen v. Kinsella*, 343 U.S. 341 (1952), concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by U.S. military forces. The U.S. Supreme Court held that in such areas the U.S. Army commander could establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they were connected with the Army or not.

legally entered a country with either the consent of the host country, or at the behest of an international organization such as the UN. The United Nations in the Congo and in the near East have actually negotiated status of forces agreements. Quite aside from the issue of whether or not any of these forces entered lawfully or not, the presumption favoring local jurisdiction is not applicable. There is no local jurisdiction by definition—the local order has collapsed—lives are in danger, and in the Dominican crisis the commander in chief made a political decision requiring you to prevent an intolerable Communist take-over.

In this situation, we actually have a pair of complementary presumptions. One, to ensure that the host country must not interfere with the force's mission, we presume an immunity from the exercise of authority by anyone else. The second operating assumption is that the United States remains internationally responsible for the acts of its agents. *Principles of state responsibility persist.* If property is taken, it should be paid for; if inhabitants are hired, they must be compensated; if men are imprisoned, it must be through a process of law; and if force is asserted, it should be exercised responsibly and reasonably.

Running deep in international relations is the theme that national power is accountable—that if unilateral action is taken, it must still conform to the demands of international law. This is certainly the United States position, restated regularly by the President, confirmed for you also in Navy Regulations. Furthermore, it is a demand that we make of others.

How do we operate with these pairs of presumptions in a military operation directed at "peace-keeping"? If you are planning one, you would be wise to include provisions for the settlement of claims. You have ample authority in United States law to do this under the Foreign Claims Act. You may recall that the Foreign Claims Act was passed by Congress in April 1918 to pay inhabitants of France for damages caused to them by members of our forces. It was amended in 1943 and 1956 to permit payments up to $15,000 to foreign inhabitants. It is the authority for the payment for damages to real or personal property, to life and limb caused by, or incident to, noncombat activities of the armed forces. Damages are determined by local law, and naturally will differ considerably from comparable damages in the United States. Careful and consistent use of the Foreign Claims Act's provision may very well improve your relations with local inhabitants and counteract Communist propaganda. For example, I understand

that in the Lebanon operation, olive groves were damaged by bivouacing marines. Olive trees grow slowly and may supply the owner's entire income. The Foreign Claims Act was used to compensate the owner for destroyed olive groves, with damages calculated according to local law.

If you can distinguish between the presumptions of law, and the rules of law in your work this week, you may find international law a little easier to grasp. You must recognize that applying presumptions to concrete problems can nevertheless be difficult; but it is also difficult to deal with problems without generalizations. We express the conviction in our legal order that decisions based solely on the appealing uniqueness of a human situation cannot supply the values or the continuity needed to give meaning and satisfaction. When we decide single problems, we look for general principles and for guides with some universal application. It is also true that we distrust large generalities as guides to our conduct, and put our faith in wisdom and techniques learned by doing. Law, therefore, supplies a means for maintaining a creative tension between propositions and particular instances.

The third function of law in my analysis is that law supplies a process for minimizing violence by placing in identified hands a legitimate monopoly of power. It does this by allocating competence to make decisions.

The risk of confusion and the threat of violence is substantial when the U.S. sends into the territory of another nation a pretty much self-sufficient body of men, capable of asserting enormous power, subject to their own internal discipline, and carrying with them their own culture in the form of movies, post exchanges, and clubs. The host country is independent, with pride in its own culture, and its inhabitants may resent the strangers and their curious ways.

We have in our own history several illustrations of these tensions. The "Boston Massacre" of 1770, for example. You may recall that the offending soldiers were tried in a colonial court, defended by John Adams, the colony's leading lawyer, and they were acquitted.

A second illustrative incident is the *Thierchens* case. Shortly before the United States entered World War I, we prosecuted, convicted, and imprisoned the captain of a German Navy cruiser for smuggling, and also for a curious violation of the Mann Act. The

Federal Court rejected the officer's pleas that he was immune from the enforcement jurisdiction of the United States. It's hard to reconcile the claim the United States made in this case with the comparable and contemporaneous *Tampico* incident involving the arrest by Mexican police of Admiral Mayo's barge crew in Tampico, Mexico. The men were eventually released, but Admiral Mayo demanded an apology and a salute to the United States' flag. When the Mexicans refused, he seized the port.

These unpleasant incidents could not be prevented by an international agreement, but the disputes which followed could have been eased if some sort of status of forces agreement or a naval visits agreement existed. Accommodation and compromise can be achieved in advance when you have a general idea of the risks, and you know what law can do. International agreements can confirm the right of a United States court-martial to act in the host country, and can make that court's authority exclusive. The competence of the host country's police, judiciary, and tax authorities can be outlined. The method for settling day-to-day tensions can be specified by claims provisions, liaison procedures, and other rules outlining mutual expectations.

The sets of compromises which we might call international law are worked out because participants think that the cost of continued disagreement is too great, and that the price paid in the form of some deference to the views and interests of others is acceptable. The gains realized are less confusion, a diminished risk of violence, and the reasonable expectation that the other fellow may, to gain similar advantage, behave similarly. We make international law because we hope to create conditions in which the behavior of others is more predictable.

Where international law does not serve mutual advantage, it becomes weak—even meaningless. Our status of forces agreement of 1950 with South Korea, for example, does not seem pertinent to the conditions there today (at least so the Koreans believe), so we have negotiated a new agreement. Quite rightly I think. Perhaps we have other international agreements affecting your privileges overseas which are also obsolete in that they appear to be one-sided. It's impossible to avoid renegotiation indefinitely. Therefore, treaties with perpetual provisions are probably not realistic.

From all this you may quickly conclude that international law is merely a front in that "nations really do what they want to do."

To this I reply, "Yes, but what nations want to do, that is what actions and policies they in fact follow, are very likely to be influenced by law, and by what lawyers say is law." This is particularly true among the United States and its friends in the western world, but even the Soviet Union and Red China use legal language in supporting their own views and interests, and what those views and interests are, may well be conditioned by "law." Russia, for example, has negotiated status of forces agreements with Poland and with East Germany. I don't think Red China has any, but if they do place major units in Viet Nam, it would not be surprising if they did negotiate some sort of "status of forces" agreement with Ho-Chi-Minh.

The law of visiting armed forces is largely treaty law today. Its rules, procedures and legitimizing force is found in dozens of international agreements negotiated in the last 15 years. It is treaty law rather than customary law because of the fourth function of law, namely: that law "legitimizes." Law is valued not as an end in itself, but as a means to serve human life. Community consensus holds nations, and their officials, accountable for their use of power–however powerful the nation, and however high or insignificant the official, and however important the declared objective. When force is used so as not to serve human life, it is considered improper–illegitimate. A legal basis for the presence of the visiting force and legal grounds for its assertion of power, far from its national home, helps supply this sense of acceptance –this sense of legitimacy.

Without a legal basis for the presence of forces, their activity would create more tension, more resentment and more confusion, both in the host country and in the United States. Aliens everywhere can be mistrusted; if they are armed, occupy valuable land, and occasionally exhibit the exhuberance of youth, their presence can be divisive to an alliance.

Without an international agreement–without the consent of the host country–it is hard to justify a foreign base. When Zanzibar demanded that NASA dismantle the tracking station–we did so; when Morocco demanded that we leave our bases there–we agreed; and we apparently will also leave Libya. On occasion, we utilize overseas bases without confirming international agreement, as in the Azores, for example, but nevertheless it is clear that we enjoy the consent of the Portuguese.

A legal basis for the presence of visiting forces also helps here at home. For example, our decision to send troops into the Dominican Republic was unilateral. I am not concerned here whether that decision was wise or foolish. It is clear, however, that the firmer that decision rests in international law, the more likely that decision will be accepted by the U.S. public, that elusive thing "world opinion," and by the Dominicans. It would make a neater legal case, for example, if the marines landed at the invitation of the host government. We could then persuasively claim with some justification that the Dominican situation was similar to the Lebanon crisis of 1958. Unfortunately, I gather that no one in the Dominican Republic with any color of authority wanted publically to invite U.S. forces. So the United States' legal case must rest on more controversial grounds, and the legal basis is harder to define.

If I have raised questions of the philosophy of law, I must apologize because about all I can remember of that subject is the definition of a philosopher—a philosopher is a blind man in a dark cellar at midnight looking for a black cat that isn't there. He is distinguished from a theologian in that the theologian finds the cat. He is also distinguished from a lawyer. The lawyer smuggles in a cat under his overcoat and emerges to produce it in triumph.

So if I have given you a philosophy of law, this definition makes me a theologian. You could call me a lawyer, but if I were the type to smuggle something in, surely the War College would not invite me here.

BIOGRAPHIC SKETCH

Professor Gordon B. Baldwin

PRESENT POSITION: Associate Professor and Assistant Dean, University of Wisconsin Law School, Madison, Wisconsin

SCHOOLS:

Haverford College, A.B., 1950
The Cornell Law School, LL.B., 1953

CAREER HIGHLIGHTS:

University of Wisconsin law faculty, 1957, to date
Assistant Professor, 1957-1960
Associate Professor, 1960, to date
Assistant Dean, 1959, to date
Subjects: International law, comparative law, and criminal law
Advisor to Wisconsin Board of Criminal Court Justices on criminal law instructions to juries, 1959, to date
Private practice of law - Rome, New York
Instructor, The Judge Advocate General's School, U.S. Army, Charlottesville, Va., in interuational and comparative law, 1955-1957
Chair of International Law, Naval War College, 1963-1964
Served on active duty with the Judge Advocate General's Corps, United States Army, in Washington, D.C., 1954-1955
Presently active in the USAR, Captain JAGC. Dnring the summer, 1960, performed active duty with Hdq., USAREUR, JA Div., Heidelberg, Germany

MEMBER: New York State Bar, Bar of the Supreme Court of the United States, American Society of International Law, American Bar Association

DECORATIONS: Commendation Ribbon, Department of the Army, 1957

PUBLICATIONS:

"The Operation of the NATO Status of Forces Agreement" (with LCOL J. H. Rouse), *American Journal of International Law,* January 1957.

"Foreign Jurisdiction and the American Soldier," 1958, *Wisconsin Law Review.*

"The Role of Law in a Limited War," *Military Law Review,* 1959.

COMPARATIVE LAW, Special Text, The Judge Advocate General's School, Charlottesville, Va.

NEW DIMENSIONS IN EXTENSION

DID YOU KNOW THAT . . . Vice Admiral B. J. Semmes, Jr., the Chief of Naval Personnel, recently stated that:

> The Navy must obtain the maximum utilization of the education and experience of all of the officers. . . . The goal of each individual officer must be to prepare and qualify himself by all means available to meet the challenge of the future.

The Correspondence School of the Naval War College continues to offer a profitable avenue of approach to professional preparedness through its various graduate-level correspondence courses.

DID YOU KNOW THAT . . . a stndent of the Correspondence Course in National and International Security Organization stated the following:

> I am presently on a Joint Staff within the NATO organization. This course has done more to give me a firm understanding of our NATO position and responsibilities than all the briefings that were given to me upon my arrival. It has been most valuable in my daily work.

DID YOU KNOW THAT . . . the following officers have recently completed the Primary Package Plan and have been awarded Certificates of Meritorious Achievement. This Plan consists of the following four courses or their equivalent: National and International Security Organization, Military Planning, Naval Operations and Command Logistics. Completion of these four courses closely parallels a command and staff level of education.

CDR Keith H. Robertson, USN
CDR Edward H. Ettner, USN
CAPT John P. Fox, USN
CAPT Ray E. Oliver, USN
CDR Evelyn H. Shaw, USCGR

DID YOU KNOW THAT . . . Commander Evelyn H. Shaw, USCGR, (listed above) recently became the first woman-officer graduate of the Correspondence Course in Naval Operations, and also the first woman officer to complete the Primary Package Plan.

RULES GOVERNING THE CONDUCT OF HOSTILITIES– THE LAWS OF WAR AND THEIR ENFORCEMENT

A lecture delivered
at the Naval War College
on 30 August 1965

by

Colonel Gerald I. A. D. Draper

HISTORICAL INTRODUCTION

War being a very ancient activity of man, it is not surprising that over the course of centuries a considerable amount of law has evolved around the subject. In the Christian era, from the early 5th to the 17th centuries, the main emphasis was laid upon the valid causes of resorting to war. The first successful achievement of the law was the outlawry of private war, the scourge of the Middle Ages. Unfortunately, the preoccupation of early writers with the "just causes" of resorting to war had an obstructive effect upon the establishment of binding rules as to how wars should be fought. However, customary rules were evolved by the gradual acceptances of certain restraints in the conduct of wars. Christian morality and chivalry played their part in this evolution. However, it was not until the "just war" idea had spent its usefulness, in the early 18th century, that the way was open to the development of the idea of a law of war which was binding on both contestants irrespective of the merits of the cause that had driven them to resort to hostilities.

In the 19th century we see the doctrine of State sovereignty attain its fullest dimensions. The right to resort to war as an instrument of national policy is seen as a central part of that sovereignty. War came to be seen as an instrument for asserting

rights, revision of treaties and the furtherance of the national policy, whether it was colonial expansion, the maintenance of the balance of power, or the pursuit of aggrandizement. This was a situation admitted and allowed by international law and operative in 1914 at the outbreak of World War I.

It is in this era, which we may call the high tide of national sovereignty, that we see the establishment of much of the codified law of war. That part of international law which was first subjected to the codification process was the law of war. Starting with the Declaration of Paris in 1856, dealing with the maritime law of war, a movement for the codification of the international law of war began which culminated in that substantial body of written law produced by the 1st and 2nd Hague Peace Conferences of 1899 and 1907, respectively. In 1907 no less than 13 Conventions were concluded, of which 12 dealt with the law of war and neutrality; eight of these dealt with various aspects of the law of war and neutrality at sea. This was a very considerable achievement. The impetus for this substantial law-making exercise was generated by a variety of factors. Prominent among these was the awakening of the humanitarian conscience of mankind, particularly after the harsh experiences of such battles as that of Solferino in 1859 and Gettysburg in 1863, the increased killing power of artillery, the anachronism of infantry tactics, the inadequacy of medical and nursing services in the field, the use of conscript armies, and the need for more precise written rules of the law of war in place of the older but vaguer customary rules upon the subject. This last factor brought its influence to bear mainly in the work of Dr. Francis Lieber which fructified in the "Instructions for the Government of Armies of the United States in the Field (General Orders, No. 100)" issued by President Lincoln in 1863. The essentially moral and humanitarian nature of the principles and rules formulated in these Instructions can be seen in Article 15 thereof: "Men who take up arms against one another in public do not cease on this account to be moral beings, responsible to one another and to God." The uncertainties of the outcome of war and the imminence of death for all those who take part in it underwrite the perennial principle underlying the law of war which is expressed in this Article.

In the codification of the law of maritime warfare achieved in the Hague Conventions of 1907 there can be seen the need to establish some balance between the rights of neutral shipping and trade and belligerent rights on the high seas, the need to humanize the treatment of the wounded, sick and shipwrecked members of

armed forces at sea by extending and adapting the Geneva Convention of 1864 relating to the sick and wounded on the battlefields, and the need, which was not fulfilled, to establish an international Prize jurisdiction and an international law of Prize to be applied in any such jurisdiction.

Throughout the law of war there can be seen the incessant endeavor to adjust and balance the military needs of belligerents with the dictates of humanity. From the earliest Christian times war has been regarded as an evil, the scope and effects of which are to be limited whenever possible. What the doctrine of the "just war" failed to do, the principles of humanity, from the late 18th century, have tried more successfully to do. The first principle of the law of war is that a belligerent may use the amount of force necessary to achieve the purpose of war, namely, the overpowering of the enemy, by the swiftest and most economical methods in the use of manpower and resources. That part of the law of war to which we pay most attention is the series of prohibitions, part humanitarian, part reasonable, part common interest, which are imposed upon this first principle. The great moral premise has been, and is, that war is an evil permitted in narrowly limited circumstances, a premise now reflected in Article 2 (4) of the United Nations Charter. The basic premise in the law about how wars are to be conducted is that all necessary force may be used to secure victory over the enemy. This premise lies underneath the substantial corpus of restrictions which we are accustomed to call the law of war. Such restrictions, however, necessarily presuppose the basic enabling principle of the legitimacy of all force necessary to overcome the enemy. The validity of this proposition is not weakened by the general principle underlying all the restrictions of the law of combat, found in Article 22 of the Hague Regulations of 1907: "The right of belligerents to adopt means of injuring the enemy is not unlimited." The juxtaposition of these restrictions to the basic premise of the law of war is of some importance. A method of conducting war is not unlawful merely because there is no express legal authorization of that method. It is lawful unless it stands condemned by the specific prohibitions of the law of war or by the general principles which inform and color those prohibitions.

THE LAW OF SEA WARFARE

The law of war is traditionally divided into the law of land, sea and aerial warfare; although modern developments in weaponry

may blur the boundaries and even add a fourth dimension, the law of war in outer space. Many of the principles of the law of war are common to all its parts, but from the nature of sea warfare the law that governs it still presents its own special delineations. The aims of sea warfare are not those of land warfare. The aims of the former are the defeat of the enemy navy, the annihilation of the enemy merchant marine, the destruction of coastal, and today, hinterland military installations and establishments, the economic strangulation of the enemy by the denial of access to its coast and the sea trade that supports its war effort, the support of landings on the enemy territory, and the general support of land operations. The defensive nature of sea warfare involves, *inter alia,* the protection of the home coast and merchant fleet.

The law of sea warfare also displays some difference in the physical objects against which such warfare may legally be directed. The main object is enemy ships, public or private. In land warfare the main object tends to be the opposing armies whilst private property enjoys a measure of protection. In the law of sea warfare individuals in the enemy ships are legitimate objects against which sea warfare may be directed, but they do not hold the primary place. In sea warfare, by concentrating on hostilities against enemy vessels three legitimate advantages are obtained at one swoop. First, the ship is either captured or or destroyed; second, the personnel are either killed, captured, or rendered incapable of assisting the enemy war effort; and third, the enemy property or contraband found thereon may be appropriated. In some respects this has made naval warfare primarily a contest between ships rather than individuals. Whether this has made such warfare more humane is open to argument. The most powerful modern weapon is now launched from a ship and is not directed at naval targets, but against the hinterland of the enemy State.

The modern divisions of the law of war have tended to depart from those just enumerated, based upon the element in which they are waged. Today we tend to see the pattern of the law of war as a fourfold division, namely, the law relating to the conduct of hostilities, allowing for the traditional distinctions between land, sea and aerial warfare; the law relating to occupation of enemy territory, with which the law of maritime war is but little concerned; the law relating to the treatment of war victims, now contained substantially in the four Geneva Conventions of 1949; and the law relating to nonhostile relations between belligerents. One of the Geneva Conventions of 1949, the second,

is devoted exclusively to the subject of victims of naval warfare, being the Convention for the amelioration of the condition of wonnded, sick and shipwrecked members of armed forces at sea. The third of these Conventions relating to the treatment of prisoners of war is very mnch the concern of naval warfare insofar as naval personnel are not exempt from the war hazards of capture. It is not normally the concern of naval personnel so far as the detention of prisoners of war is concerned. There is a marginal concern insofar as there may be special Naval Interrogation Centres in which naval interrogators operate. This law relating to the treatment of war victims, as expressed in the four Geneva Conventions of 1949, is a solid part of the modern law of war, comprising well over half of its total content. They comprise in all, 417 articles.

The law relating to the enforcement of the law of war imprints itself on all sectors of the law of war, whether one adopts the traditional sectors or the more modern divisions. As we shall see, a large part of the modern law about the enforcement of the law of war is to be found in the Geneva Conventions although substantial areas, including that concerning the enforcement of the law of hostilities are still to be found in customary law and in the numerous judicial precedents furnished by the international and national war crimes tribunals operating at the end of World War II. The Law of Sea Warfare shares the law of enforcement with the other sectors of the Law of War.

THE LAW RELATING TO HOSTILITIES AT SEA

The Law of Sea Warfare lacks any Convention dealing generally with naval hostilities, such as the Hague Convention No. IV of 1907 concerning the Laws and Customs of War ou Land. However, certain of the general principles expressed in that Convention apply to naval hostilities. In particular, the general principle formulated in Article 22 therein, that the means of injuring the enemy are not unlimited, applies. The prohibitions of poison, treachery, of the denial of quarter and weapons which cause unnecessary suffering, prohibitions which already existed under customary law, will bind participants in naval hostilities. However, in matters such as naval bombardment, a matter of some importance today, and the use of submarine contact mines, Conventions were concluded in 1907 dealing exclusively with these topics. These Conventions are in force today. Hague Convention No. IX deals with bombardment by naval forces in time of war

and Hague Convention No. VIII deals with the laying of submarine Contact Mines.

The Law of War contains a basis prohibition that warfare is not to be conducted against civilians as such. This is a customary law prohibition and underlies international conventions dealing with war, including the four Geneva Conventions of 1949. The corollary of this principle is that the Law of War determines who have the privilege of belligerent action and who have not. It is a serious violation on the part of those to whom the law of war does not accord the privilege of being combatants, to participate in hostile action against the enemy. It is thus that the idea of "marauding" passed into the customary law of war. Marauders are an early example of war criminals. In former times they received short shrift and today they are exposed to the risk of trial for violating the law of war and upon conviction, to a heavy penalty. Very early the law of war condemned private wars. It has now for some time condemned those private persons who join in a public war unless the law has given them the right or privilege to participate. That right is jealously contained, and is virtually limited to members of organized resistance movements and of a *levee en masse*. If the innocent civilian is to be excluded from the objects of warfare and is not to be deliberately attacked, the reverse of the coin is that the civilian who joins in the fight without legal justification merits condign punishment. In the law of sea warfare it is men-of-war and their naval crews which have the privilege of conducting naval hostilities. Other public ships and private ships, i.e., merchantmen, fishing trawlers and private vessels, are treated as marauders if they initiate an armed attack on enemy warships. One practical result of this principle is that the law of war determines what is a warship and regulates the conversion of merchant ships into warships in time of war. Thus, among the Hague Conventions of 1907 we find Convention No. VII relating to the Conversion of Merchant Ships into Warships. The conditions are stringent and the Convention is still in force. It also gives us the legal definition of a warship. To qualify as a warship the Convention requires that a ship must be placed under the direct authority, immediate control, and the responsibility of the State whose flag it flies and must bear the external marks distinguishing the warships of the State under whose authority it acts; the commander of the ship must be in the service of that State and duly commissioned and listed in its Navy List; the crew must be subject to the regular naval discipline of that State, and the ship must observe the law of war, including the provisious in this Convention. It is generally accepted that this Convention

codified the existing customary law as to the qualification of a warship. The implications of this Convention for any such project as the M.L.F. or the A.N.F. are serious.

The customary rules relating to the conduct of naval hostilities still maintain that all enemy men-of-war or other public vessels encountered by an enemy man-of-war on the high seas or in the territorial sea of the opposing belligerent may be attacked and, subject to there being no signal of surrender, may be destroyed or sunk. Conversely, all such vessels may, of course, counterattack. This attack may be by shell or missile firing, torpedoes, ramming, or by bombing from aircraft. Boarding and fighting the crew are lawful, but rarely indulged.

It is the legal position of merchantmen and the employment of submarines that have presented the major area of legal controversy during the two last wars. In law enemy merchantmen are private enemy ships. As such they are not liable to attack unless they refuse to submit to visit by enemy men-of-war after being signalled to do so. The merchant ship is entitled to try and elude the visit and may use force to defend herself against attack. The initiation of force by a merchant ship is in law a form of marauding exposing the captured crew to the risk of trial and punishment. The modern practice of sea warfare, however, is quite otherwise. The employment of submarines, which are men-of-war, and their practice of sinking without warning enemy and neutral merchantmen, led to the arming of merchantmen on an extensive scale in both world wars. In the view of some, this practice has resulted in the virtual integration of the merchant marine into the belligerents' navies to the extent that they can lawfully be attacked on sight. This is open to doubt. Certainly it would be difficult to justify an attack on an enemy warship initiated by an armed merchant ship. Neither is it legitimate for coastal or other shore batteries to open up on a merchant ship merely because it is known to be armed. The better opinion may be that the arming of merchantmen to meet the threat of attack without warning, particularly by enemy submarines, does not of itself deprive them of their status as merchantmen or confer upon them that of a warship. If it is known that enemy submarines are in the habit of sinking merchant ships without warning, it is not legally necessary for the merchant ship to wait to be attacked. They may lawfully resort to hostile action if alerted of the presence of hostile submarines, e.g., by dropping depth charges, firing upon, and even ramming, if the submarine is forced to the surface. Such action might properly be taken by the merchantman even after being signalled to stop and submit to

visit and search, particularly if the practice of the enemy is to fail to pick up the merchant ships' crew and to turn them adrift in lifeboats on the high seas.

From the nature of this situation it is apparent how far sea warfare practices have gone beyond those allowed by the law of war. A merchant ship was not the lawful object of attack but might be stopped, visited and searched, placed under the captor's authority and taken before its Prize Court, there to be condemned by adjudication. Once adjudicated by condemnation in Prize then, and then only, did the enemy vessel and enemy property vest in the enemy belligerent State. With enemy public ships, the legal position was quite otherwise. By the mere fact of capture of such ships they were then and there finally appropriated to the capturing belligerent. They could be taken to a port or destroyed on the high seas. Enemy goods on such public ships are also legally appropriated by the fact of capture and may be destroyed if desired.

This neat and tidy part of the law of sea warfare has been disrupted by the advent and use of submarine warfare. A submarine is in law a warship and may therefore exercise the right of visit and search over enemy merchant ships and capture them. Clearly a submarine cannot spare a prize crew to take a prize into one of its ports for adjudication in Prize. Nor is there space in the submarine for the crew of the prize. In these circumstances some have considered that submarines may never lawfully destroy a captured enemy merchantman. Before the advent of the submarine limited exceptions were allowed to the general rule that a prize must be conducted into a port for adjudication. One was when the condition of the prize precluded navigation into such a port. The other was when the capturing vessel could not spare a prize crew to take the prize into port. Arguments arose as to the exclusiveness of these exceptions. The practice in the American Civil War was for the Confederate Navy to destroy all enemy prizes, there being no port open to which to take them. Be that as it may, it was generally accepted as a legal requirement that the crew of the prize had to be removed in safety and brought in later, with the papers and the cargo, to the Prize Court for adjudication upon the validity of the capture and the destruction of the ship. It is against this background of law that one must, I think, see the practices in submarine warfare that developed in the last two world wars. The Germans resorted in World War I to the practice of destroying after a limited warning of minutes, all enemy merchantmen found in a proclaimed "war area" around Great Britain. Ten minutes warning was normally given to leave the

ship and take to the boats. Such a warning would be considered generous in the light of the practices in World War II. After 1915 Germany extended this practice to neutral merchant ships. The *Lusitania,* sunk in 1915 off the Irish coast, was but one of many such incidents. In that loss 1100 civilian personnel were lost, including a large number of women and children.

It was in the light of these practices that an attempt was made between the two wars to establish a Convention to protect neutrals and noncombatants at sea in time of war. The attempt was not immediately successful as the Treaty of Washington of 1922 was never ratified by any of the signatory Powers. However, the Treaty proceeded on the assumption that submarines could not operate in practice as commerce destroyers, without violating the existing customary international law of sea warfare. Accordingly, the abortive Treaty sought to forbid the use of submarines for such a purpose. The matter was then included in the London Naval Treaty of 1930 to which the U.S., the U.K., France, Italy, and Japan were all Parties. This Treaty expired in 1936 but the Part (IV) which dealt with the relation between submarines and enemy merchant shipping was considered to be declaratory of existing customary law. Further, in 1936 a Protocol to the London Naval Treaty of 1930 was signed which included Part IV of the latter. This Protocol bound the original States Parties of the 1930 Treaty and came to bind both Germany and the USSR by accession in 1936 and 1937 respectively. The Protocol was in force during World War II and is still in force today. Its provisions are important, for their infringement resulted in the conviction of Grand Admiral Doenitz by the International Military Tribunal (I.M.T.) at Nuremberg, in his capacity as Commander in Chief German U-boat Command during World War II. The Protocol of 1936 affirms the guiding principle that submarines in their actions against enemy merchant ships must observe the rules of international law binding upon surface men-of-war. In other words, they are granted no special rights because they operate under water, have little space for captured crew and cannot navigate prizes to ports. More specifically the Protocol provides that "except in case of persistent refusal to stop on being summoned or of active resistance to visit or search, a warship, whether surface or submarine, may not sink or render incapable of navigation a merchant vessel without first having placed passengers, crew and ship's papers in a place of safety." Further, the ship's boats can be regarded as such a place of safety only if the safety of the passengers and crew is assured, having regard to the conditions of the weather and the sea, the proximity

of the land, or the presence of another vessel able to take them on board. Now this is stringent. Subject to the operation of reprisals, which from their nature admit the illegality of violative conduct, this Protocol is binding as law today.

In World War II the German U-boats systematically disregarded this Protocol. The Judgment of the I.M.T. upon Doenitz in this context will repay study. The Judgment has been affirmed by the unanimous resolution of the General Assembly of the UN in December 1946. The Tribunal held: (1) Because the British Admiralty armed its merchantmen, convoyed them with armed escort and had ordered the giving of position reports of the presence of German U-boats, thus integrating them into the alerting system of naval intelligence, and for the ramming of them if possible, Doenitz was not guilty of attacking British armed merchant ships. (2) The German U-boat sinkings of neutral merchant vessels without warning in the so-called "operational zones" was a violation of the London Protocol of 1936 for which Doenitz was guilty. The Protocol of 1936 had been made in the knowledge that such "operational zones" had been used in World War I. (3) Doenitz's orders of 1942 though deserving of censure for their ambiguous terms, did not in fact order the killing of shipwrecked survivors of sunk enemy or neutral merchant ships. Of that Doenitz was not guilty. (4) On the other hand, the rescue provisions required by the Protocol of 1936 had not been carried out and the defendant had ordered that they should not be carried out. In answer to the contention of the defense that the security of the attacking submarine takes paramountcy over rescue and that enemy aircraft render such rescue impossible, the Tribunal pointed out that the Protocol is explicit and makes no allowance for such defenses. In memorable words it stated: "If the commander [of the submarine] cannot rescue, then under the terms [of the Protocol] he cannot sink a merchant vessel and should allow it to pass harmless before his periscope." Doenitz was therefore found guilty of issuing an order violative of the Protocol in this respect. (5) In the matter of sentence, and not of guilt, the Tribunal had regard to the order of the British Admiralty Order of May 1940, ordering the sinking of all vessels at sight in the Skagerrak, and to the unrestricted submarine warfare carried on by Admiral Nimitz in the Pacific Ocean from the first day the U.S. entered the war. In the light of these considerations the Tribunal stated: "The sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare." This passage has been the subject of some debate. One thing, however, emerges. The

Law of the Protocol of 1936 binds those who order and operate submarines in war. Operational necessity and the safety of the submarine are not valid defenses to its infringement. It also lets in the more dubious proposition that the arming of merchantmen, their use in the naval intelligence system, and the order that they ram submarines, exposes them to attack without warning by enemy submarines. To the extent that the arming of merchantmen will probably be the normal practice of belligerents, that part of the Judgment which concerns us here is the condemnation of Doenitz for violation of the rescue provisions of the London Protocol.

That aspect of naval hostilities which is likely to prove of some importance in future armed conflicts is the nuclear bombardment of the enemy hinterland from submarines or surface men-of-war. The "Polaris" device, and improvements upon it, are probably the most effective weapon of war yet devised. Here the law relating to bombardment of the land from ships at sea, and the law relating to the use of a long-range missile with a nuclear potential, come into play. The law of naval bombardment is still subject to the principles of customary law codified in Articles 25 to 27 of the Hague Regulations of 1907 as modified by Hague Convention No. VII of the same year respecting Bombardment by Naval Forces in time of War. To the contention that the bombing practices by air forces in World War II have modified or shifted the content of those customary rules, it may be said that such a contention is difficult to maintain against a codification of custom expressly subscribed to by States in those Conventions. Further, the language of the Air Ministry directive of 29 October, reaffirms, at least for the U.K., the customary prohibitions of indiscriminate bombardment. After ordering that the military objective criterion is to be abandoned in the bombing of Germany, Japan, and Italy, as opposed to the occupied territories, except that the provisions of the Geneva Red Cross Conventions of 1929 were still to be observed, the directive continued: . . . "Consequent upon the enemy's adoption of a campaign of unrestricted air warfare, the Cabinet have authorized a bombing policy which includes the attack on enemy morale . . .." By issuing this directive the British Government made it clear that it knew that the law made a clear distinction between legal and illegal bombing, that it knew what that distinction was, that it would apply legal measures in occupied territories, and by contrast, illegal measures over the enemy home territories, and that it would rely upon the enemy's prior illegalities in justification for its action. That is really an assertion of the right to exercise reprisals. Reprisals implicitly admit that if their occasion is not justified in

law, your actions under that head stand condemned as illegal. In fact, by October 1942, Germany was not in a position to carry out indiscriminate bombing in the West. Doubtless, other gross violations of its law of war could have been laid at Germany's door at that time, but that was not the legal platform upon which the Cabinet chose to base its attack on "enemy morale."

Now Hague Convention No. IX, on world bombardment, has been ratified by the U.S., Russia, and China, but not by the United Kingdom. However, the limitation of legitimate bombardment to military objectives contained therein restates the customary law. What has happened, however, is the considerable extension of the conception of "military objectives" since that date. The indiscriminate or deliberate bombing of the civilian population by naval ships would stand condemned by the Hague Convention No. IX, Hague Convention No. IV, and the principles of the customary law. It can be said that the legal limits of land targets are not extended because bombardment is by naval ships on the high seas.

The nuclear aspect of such naval bombardments is exposed to the criteria of lawful military objectives, the condemnation of the use of poison, or of weapons calculated to cause unnecessary suffering, the implications of the Geneva Gas Protocol of 1925 condemning of "poisonous or other gases, and all analogous liquids, materials, or devices," and the principles of humanity which lie at the root of the customary and conventional law of war. It is not possible to give a legal answer at large. Each particular set of circumstances surrounding a specific user of a nuclear weapon, as to target, effects, and intention, will have to be taken into account, if there is anybody left to carry out that appraisal. Further, even if it be established that a specific user of the nuclear weapon is, in the context of the specific facts, violative of the law of war, it has to be remembered that the user may take its justification as an act of reprisal, unless the victims are those classes of war victims against whom reprisals are expressly prohibited by the Geneva Conventions of 1949. What is much more likely is that the enemy which has been the object of a nuclear strike will be physically precluded from carrying out its humanitarian obligations in relations to the prisoners of war, and the enemy sick and wounded in its hands. What must, I think, be admitted is that nuclear weaponry such as we have at the moment is not likely to be used in circumstances that can be legally justified except possibly as an act of reprisal. To talk of objectives such as a fleet in the ocean, or an army in the desert, is academic,

for such targets are not likely to be presented to an enemy with a nuclear potential unless the direction of the war has gone sadly awry.

The two kinds of naval hostilities discussed here do more than touch the fringe of the law relating to hostilities at sea.

THE GENEVA CONVENTIONS OF 1949

The four Conventions concluded at Geneva in 1949 substantially exhaust the modern law relating to the treatment of war victims. The first governs the treatment of the sick and wounded in the armed forces in the Field and supplants the earlier Convention of 1929. The second deals with the treatment of the wounded, sick, and shipwrecked members of armed forces at sea, replacing the earlier Convention of 1907. The third deals with the treatment of prisoners of war, replacing the earlier Convention of 1929. The fourth deals with the protection of civilian persons in time of war. This is an innovatory Convention to the extent that no such multilateral Convention dealing exclusively with civilians previously existed. The Civilians Convention is the most complex of the four. It applies to a limited extent to the entire civilian population of the States in conflict, but more effectively to the civilians who find themselves in the domestic territory of the opposing belligerent, and, in considerable detail, to the civilian population in occupied territory. Finally, it regulates the treatment to be accorded to civilian internees whether held in enemy domestic territory or in occupied territory.

The Conventions have this in common: each of them has been forged in the light of the harsh experiences of the recent war, recently described "as the mortgage of the past," perhaps the outstanding euphemism of our time. They are multilateral, law-making conventions, humanitarian in purpose and antiwar in philosophical inclination. They comprise in all some 417 articles varying from principles of great width to detailed prescriptions about the issue of tobacco and soap, matters of much moment to prisoners of war and internees. To date, 106 States have subscribed to them, the most recent being Canada in May of this year. Each of the Four Conventions contain certain "common articles" which set the framework and provide for the enforcement of them. These common articles, among other things, provide that the Conventions must be respected in all circumstances. This precludes reciprocal obligations and means that the failure

of the enemy to comply with them does not absolve the other Party to the armed conflict from its obligations thereunder. Apart from the express prohibition of reprisal action against the persons protected by these Conventions, this common article probably has the same effect of its own force. The Conventions are to apply in all cases of declared war or of any other armed conflict. They bind the Parties even in relation to a State which is not a Party, provided the latter accepts and applies them. In that case only is the obligation of a Party to the Convention reciprocal. Each Convention has one Article (3) limited exclusively to internal conflicts within the territory of a Party. The basic minimum humanitarian prohibitions then come into play and bind Government and rebel forces alike, irrespective of any question of recognition of belligerency being accorded or denied to the insurgents. The Article has been called "a Convention in miniature." It prohibits murder, mutilation and cruel treatment, the taking of hostages, humiliating and degrading treatment, and the passing of sentences or executions without trial by a proper tribunal affording the judicial guarantees demanded by civilized peoples. The Article in no way affects the legal status of the Parties to the conflict. Rebels remain such and are exposed to the domestic law of treason if the rebellion should fail.

No person protected by the Convention may renounce the rights conferred upon him by the Conventions. The availability and functions of the Protecting Power are provided for with some particularity. The Protecting Power plays a prominent part under the regime of the Conventions in securing their observance. They do so in the interests of the person protected under each Convention. The Conventions define the class of person protected under each one of them. The bulk of the Articles deal with the specific norms of humanitarian treatment which must be accorded to the persons protected by them. All of these protected persons have this in common: that they have, by the tide of war, fallen into the power of the enemy and either have never been combatants or are no longer, through wounds, sickness, or capture, able to take part in hostilities. Each of these norms has been framed in the light of the experience of the last war, particularly in relation to the maltreatment of civilian persons in occupied territory, prisoners of war and the persons placed in concentration and work camps run by the Germans and Japanese. Each Convention requires the Parties to include instruction as to their contents in all programs of military instruction and, if possible, of civil instruction. It is difficult to exaggerate the importance of this provision and it is equally difficult to contend that Governments are observing it at

the present time. This provision calls for implementation in time of peace. It must now be considered as a modality, and not the least important one, for the enforcement of the law of war. The number of States bound by these Conventions, 106 in all, the width of the provisions contained in them, and their number, the substantial part of the modern law of war represented by these Conventions, the virtual replacement of the law of war criminality by the conceptiou of "grave breaches" as defined in these Conventions, give the "common article" requiring this instruction a paramount importance. Lack of its observance has already had some unfortunate repercussions in places where it can be ill afforded, e.g., in the conduct of members of national contingents forming part of United Nations peace-keeping forces. It is probably correct in law to say that these Conventions do not apply as such to these forces, but there can be little doubt that every measure should be taken to ensure that the members of national contingents in such forces comport themselves in accord with the humanitarian dictates of these Conventions. With that end in view certain measures are now being taken by the Secretary-General towards ensuring that such instruction has been given by a Member State as a precondition for its national contingent participating in a UN peace-keeping Force.

The Conventions have put States Parties to them under the legal obligation to enact legislation necessary to provide effective penal sanctions for all persons ordering or committing any of the grave breaches as defined in each Convention. Grave breaches include willful killing, torture, biological experiments, willfully inflicting great suffering, and deportation. States Parties have likewise the legal duty to search for, and bring to trial, persons regardless of their nationality who have ordered or committed such grave breaches. Such trials must take place before the ordinary courts of the State asserting jurisdiction. This provision, within its proper limits, excludes the Nuremberg and other types of international war crimes jurisdictions for the future and has made a profound change in enforcement law.

The Maritime Convention, the Second Geneva Convention of 1949, establishes the basic principle that members of the armed forces and those assimilated to them, such as auxiliaries, employed civilians, members of organized resistance movements, who are at sea and who are wounded, sick or shipwrecked, must be respected and protected in all circumstances. Subject to that provision they are entitled, when they fall into enemy hands, to prisoner-of-war status under the Prisoners-of-War Convention.

The Maritime Convention specifies the various classes of hospital ships and the protection to which they are entitled, and the type of marking which they must display. Reprisals are prohibited against the sick, wounded, and shipwrecked, and the personnel, hospital ships, and equipment protected by the Convention. This prohibition did not appear in the earlier Maritime Convention of 1907.

The Prisoners-of-War Convention, the Third Geneva Convention of 1949, will, for the future, be the charter of rights of the prisoner of war. Apart from the common articles earlier outlined, this Convention defines in detail the class of persons who are to enjoy that status, whenever they have "fallen into the power of the enemy." It includes members of organized resistance movements operating within or without occupied territory openly and under discipline, and the civilian population which spontaneously takes up arms on the approach of an invader provided that members of both categories carry arms openly and conduct themselves in accordance with the law of war, a very unlikely contingency. Prisoners of war have that status, and the rights conferred upon them by the Convention, from the time they fall into the hands of the enemy until their final release *and* repatriation. They cannot effectively renounce these rights even if they try. If there is any doubt as to status, and the person concerned has committed a hostile act, he will receive the benefit of prisoner-of-war status pending determination of status by a competent tribunal.

The general scheme of this Convention is to apply to the prisoner of war the same standards of treatment which prevail in the armed forces of the Detaining Power. In matters of discipline and trial the prisoner of war is to be tied into the military law system of the Detaining Power in most respects. In particular he is to be tried by military courts except where the members of the armed forces of the Detaining Power would be tried by the civil courts for the like offense. One outstanding innovation has been made in this context. By Article 85 prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefit of the Convention. This provision extends to acts of war crimes of any character. It means that in respect to such acts a prisoner of war must in the future be tried either by a military court or an ordinary civil court of the Detaining Power. Special war crimes tribunals, Nuremberg, and other types of international tribunals, are excluded from jurisdiction over all types of war crimes committed by prisoners of war whether or not such crimes are covered by the extensive definition of *grave breaches* contained in the Conventions.

This Convention, in common with the other three, does not seek to deal with the law of combat except in one or two marginal matters, and then only obliquely. It is arguable, but the better opinion seems to be, that a member of the armed forces caught whilst engaged in espionage would not be entitled to claim prisoner-of-war status, although he may have the limited protection conferred upon such persons under the fourth, the Civilians Convention. A prisoner of war upon conviction has the same rights of appeal as are open to members of the armed forces of the Detaining Power and must serve his sentence in the same establishment, even for war crimes convictions. The USSR and its associates have reserved upon this provision but the reservation has been firmly rejected by the U.K. The resulting legal position is not clear, but with the experience of World War II, when the USSR found itself invaded without the protection of the Geneva Prisoners-of-War Convention of 1929, it is not thought that the USSR will contend that it is not in treaty relationship with the objecting Parties. In the detailed provisions relating to accommodation, clothing, food, comforts, recreation, and the practice of religion, the standard adopted has been that of the armed forces of the Detaining Power. The work which an enlisted man may be ordered to do is expressly recited. Other work is prohibited. Officers may not be ordered to do any work. Their pay code is set out with precision. The information a prisoner of war may be required to furnish his captor is strictly controlled. His right to complain and to have access to the representatives of the Protecting Power for that purpose are expressly established in the Convention.

In all the Convention sets up a formidable regime of rights. This regime has now made the prisoner-of-war status a matter of vital importance.

THE ENFORCEMENT OF THE LAW OF WAR
(Or Means of Securing Legitimate Warfare)

The ways in which the law of war may be enforced are various. There are meta-legal forces in favor of legitimate warfare such as domestic and neutral opinion, self-interest and fear of adverse consequences, to name only a few. With these, this talk is not concerned. We do well, however, to take note of their existence for they are the background of reality against which the legal modalities for the enforcement of the law of war operate. There are, conversely, other meta-legal forces which operate in the

opposite direction. These are the factors dissuasive of law observance in time of war. War being the supreme antisocial relationship between men and the ultimate challenge to law and order, conducted for the purpose of overcoming an opponent, there is always at work a powerful urge to disregard legal restraints in the conduct of war. Public utterances by war leaders avowing respect for the Law of War and denying any breach of it are frequently calculated exercises in hyprocrisy, the tribute that vice pays to virtue. However, even in these statements there can be seen the strong impression that it is a bad thing to be discovered, *flagrante delicto,* violating the Law of War. The wholesale gassing of the Jews was not made a top secret matter merely because there might be disorders outside the gas chambers, as there were on two famous occasions.

We are here concerned primarily with the legal modalities available for the enforcement and observance of the Law of War. There are two things I would like to stress at this point: (1) The trial of war criminals is only one of those modalities and not necessarily the most effective or the most likely to be resorted to by States or organizations of States in the future. (2) Of the war crimes jurisdictions which functioned after World War II the I.M.T.s at Nuremberg and Tokyo were the only international tribunals. Each of them tried one case only. The vast majority of war crimes trials took place before municipal civil or military jurisdictions, either specially created, or forming part of the ordinary criminal jurisdiction of States or as part of the system of Occupation courts.

I would mention here some six modalities and have time to discuss only two. They are: (1) Measures of self-help, e.g., reprisals, now limited to the conduct of hostilities, as reprisals against war victims are expressly forbidden for the majority of States by the operation of the Geneva Conventions of 1949; the taking of hostages, now forbidden by the Geneva Conventions of 1949, and the trial of war criminals, particularly the obligatory trial and punishment of those who commit grave breaches of the Geneva Conventions; (2) complaints to the enemy, to neutral States, to the Protecting Power, the International Committee of the Red Cross, the use of good offices, mediation and intervention by neutral States; (3) payment of compensation either under Article 3 of the Hague Regulations of 1907 or reparation payable under the customary law principles of State responsibility, and reparations or indemnities payable under Peace Treaties; (4) educative measures of instruction in time of peace and war by

States under the obligations in the Geneva Conventions of 1949 and the Cultural Property Protection Convention of 1954; (5) State responsibility under the Genocide Convention of 1948 to be determined by the International Court of Justice, and the award of reparation thereby; (6) recommended action by the General Assembly or even directed action by the Security Council under the UN Charter. Of these six I take up here only war crimes trials and the educative process under the Geneva Conventions. The former operates after the commission of criminality, the other before.

The Nuremberg I.M.T. jurisdiction was based upon the London Agreement, and the Charter thereto appended concluded between the four victory powers August 1945. It was the joint exercise under a treaty of a jurisdiction that was legally available to each of the four participating States by customary law. A State has by customary law the right to try enemy war criminals who fall into their hands. Further than that, any State has such a jurisdiction whether or not it participated in the war or whether it existed at the time. The analogy offered is the universal customary law jurisdiction over pirates. The most recent precedent for this claim was the *Eichmann Trial* in 1962. In the Nuremberg Trial the tribunal was set up by the London Agreement and its Charter. The latter instrument determined the class of the accused and the types of war criminality within the Tribunal's jurisdiction. It also denied the exculpating effect of official position, or of superior orders. To this day a controversy continues whether in so doing the Charter restated old law or made new substantive law. War criminals had long been considered by customary law as common enemies of all mankind, as are pirates. In setting up a quadripartite tribunal the four States were by treaty doing in concert what each of them was entitled by customary law to do individually. Not only did a number of States subsequently adhere to the London Agreement under its terms, but the principles of the Charter and the Judgment were reaffirmed by unanimous vote of the General Assembly in 1946. This is a matter of considerable legal significance indicating subscription by a large number of States to the substantive law of war crimes, including the principle of individual criminal responsibility and to the lawful exercise of criminal jurisdiction over such individuals.

The architect of the Nuremberg Trial was without doubt the late Mr. Justice Jackson, in the face of considerable opposition from the late Sir Winston Churchill. The latter favored the immediate execution without trial of some six or more leading Nazis.

Sir Winston in the same month, April 1945, expressed his horror when that fate overtook Mussolini. As early as 1941 Mr. Justice Jackson had expressed his view before the American Bar Association that ". . . we may be certain we do less injustice by the worst possible processes of the law than would be done by the best use of violence." Nuremberg was in the result far from being the worst process of the law. If any injustice were done, it was in my view, in the allocation of incompetent German defense counsel to men faced with a devastating indictment, conviction upon which carried the death penalty. This inadequacy of the German defense counsel may be seen as a direct consequence of the denial, over 12 years, of the Rule of Law, whether municipal or international, in the Third Reich. The study of International Law was not included in Hitler's plans for the "thousand-year Reich."

After World War II the State victors, both in the East and the West, established war crimes jurisdictions under their municipal law. Some jurisdictions, such as the French, operated in domestic and in occupied territory, and consisted of different tribunals applying a different approach to the legal idea of war criminality according to where they sat. Other countries, such as the U.K., exercised war crimes jurisdiction only in occupied territory in the West. The U.S. exercised civil and military jurisdiction in occupied territory in the East and in China. Enemy States such as Germany, Italy, Hungary, Bulgaria, and Roumania set up their own national war crimes jurisdictions. The trial of war criminals continues in Germany at the moment of speaking. There was a multiplicity of jurisdictions comprising civil, military, *ad hoc,* permanent and Occupation courts. There was also some variations in the substantive law applied and in the rules of evidence and procedure adopted.

It is in the light of this experience that the Geneva Conventions of 1949 have established one jurisdiction for the trial of "grave breaches" of those Conventions. In the case of civilian accused, of any nationality, friend, foe or neutral, wheresoever the scene of the crime, the jurisdiction is to be that of the ordinary courts of the State asserting jurisdiction. The exercise of this criminal jurisdiction is obligatory for a State bound by these Conventions, whenever the accused and the evidence repose in its hands. In the case of accused prisoners of war charged with "grave breaches" or any other form of war criminality, including a crime against peace, the jurisdiction is to be that of the military courts of the Detaining Power available for members of the latter's armed

forces charged with a like crime, unless under the law of the Detaining Power a civil court would have that jurisdiction. This is a big change in the law. It is designed to remove the multiplicity of jurisdictions outlined above and to ensure that foe and national of the trying State go before the same court when charged with "grave breaches," and, in the case of prisoners of war, with war criminality generally. Today it must be considered that the area of "grave breaches" will cover most serious war crimes in the strict sense, excluding crimes against the law of combat. Today reprisals still exist as a method of law enforcement, but in a strictly limited area, namely, combat law. In relation to war victims reprisals are now forbidden. Hostages may no longer be taken for any purpose.

Those who order a war crime and those who commit one are individually responsible. Those who commit such a crime under superior orders will find that different States take different views of the accused's responsibility. The majority of States trying war criminals after the last war seem to have adopted the view that such orders of themselves are not a lawful excuse. The Nuremberg Charter allowed for only a mitigating effect upon sentence where the accused acted under superior orders, but the Judgment stated: "The true test . . . is not the existence of the order but whether moral choice was in fact possible." This was not a very satisfactory formula. It would seem that the Tribunal meant that the superior order is not of itself a lawful excuse; other factors, and drastic ones at that, must be present before a valid defense appears. Duress, necessity, or physical coercion may be added as separate or cumulative defenses, but they are not the same as superior orders. It would seem that the answer must lie in the consensus of the criminal law principles of civilized States unless it is to be argued that States have adopted the Nuremberg Judgment view, as affirmed in the General Assembly Resolution of 1946 referred to above. The International Law Commission ultimately offered the formula that the accused would be responsible only if in the circumstances it was "possible" for him to act contrary to superior orders. That does not help much. The question of who has the onus of proof in this matter is, in the Anglo-American system of criminal procedure, a matter of some importance. In fact, most convicted war criminals committed their acts *con amore* and not under pressure of orders.

The question of superior orders brings in the last of the law enforcement modalities I want to mention here: the requirement of instruction in the Geneva Convention of 1949. A civilian or

serviceman thus instructed will not in the future be able to plead as a defense that he knew not that his conduct was prohibited by the law of war or that he thought that the order he received was lawful. Neither will he be able to advance the defense, when charged with a "grave breach," that he thought it was a reprisal order, reprisals being forbidden by those selfsame Conventions in relation to protected persons and prisoners of war. However, if charged with a combat crime, such as the use of poisonous gas, or the criminal use of a nuclear weapon, he may plead that he acted not only under a superior order but under a reprisal order of his Government. The limits of lawful reprisal action are stringent. On principle it would seem that the accused is likely to be held responsible even where he genuinely thought, but in the event mistakenly, that a reprisal had been ordered, or if it transpires that its exercise was unlawful. In such circumstances, however, the mitigation is so cogent that the sentence would reflect a minimum guilt, assuming the good faith of the accused. If such facts were known to a prosecutor in advance, he would be well advised not to launch the case. The crux of the legal difficulty may be: where does the onus of proof lie, on the prosecution or the defense—a matter that may be determined by municipal law? That, I suggest, is one of the reasons why trials of war criminals during hostilities are not calculated to advance international justice. Evidence of superior orders and the exercise of reprisals will not normally be available to the accused until hostilities are finished. Against this consideration must be set the long period of pretrial custody that a person charged with war crimes may have to wait until his trial. It does not advance the cause of international justice for the accused to receive a sentence of 5 years imprisonment and for the court to order his release then and there because he has spent that time in pretrial custody.

On balance I am inclined to think, after a long and somewhat painful experience in war crimes forums, that the moral, social, and disciplinary effects of thorough instruction in the law of war in general, and in the Geneva Conventions of 1949 in particular, now a matter of high legal obligation, may in the long run prove more persuasive of law observance and dissuasive of its breach than the execution or long imprisonment of war criminals. Such instruction may obviate criminality before its commission. Trials take place after the criminal action when, clearly, instruction has failed in its purpose. In any event, the educative effect upon the executed war criminal is minimal. The effect of a death upon the condemned's family is not to be ignored. The sight of mothers, wives, and daughters being removed from the courtroom suffering

from acute hysteria will remain with me for the rest of my life. In my view, for what it is worth, war crimes trials should be held in reserve for the more serious types of war criminality, i.e., as the ultimate sanction. Instruction in the law of war and the humanitarian code of conduct enjoined thereby, render the recipient aware that there are paramount legal norms, based upon the moral, humane, and rational order, which transcend municipal laws and superior orders at variance with or denying that order. Governments which fail to give that instruction in the law of war now required by the law of war render their armed forces and civil population and the entire community of civilized men and women, a grave disservice which posterity will not fail to condemn. Governments have been given full and adequate warning. Let them disregard it at their peril.

BIOGRAPHIC SKETCH

Colonel Gerald I. A. D. Draper

PRESENT POSITION: Reader in Public International Law at King's College, University of London, practicing barrister-at-law

SCHOOLS:

Private schools and a private tutor

CAREER HIGHLIGHTS:

Solicitor, 1936-1940
Officer in H.M.'s Irish Guards, 1940-1945
Officer in the Military Department of the Office of the Judge-Advocate-General, 1945-1948
Assistant Director of Army Legal Staff, War Office, 1950-1956
Senior War Crimes Prosecutor, 1947-1949, Germany, British Zone
University don from 1956 to the present time
Barrister-at-law, 1946
Practice at the Bar, 1956 to the present time
NATO Fellowship awarded, 1958
Visiting Professor in the Faculty of Law of the University of Cairo, 1964-1965. Lecturer at Hague Academy of International Law, 1965
Lecturer at Naval College, Greenwich, 1961 to the present time

PUBLICATIONS:

Joint author with the late Judge Lauterpacht of *Manual on the Law of War on Land,* published for the War Office, 1958.
Red Cross Conventions, 1958.
Civilians and the NATO Status of Forces Agreement, now being published.
Articles in *International Affairs, Law Quarterly Review, U.S. Military Law Review, The Listener, International and Comparative Law Quarterly, Transactions of the Grotius Society, Egyptian International Law Review, Blackfriars, International Review of the Red Cross,* and reviews in the *British Year Book of International Law and the Journal of the Society of Public Teachers of Law.*

PROFESSIONAL READING

The evaluations of recent books listed in this section have been prepared for the use of resident students. Officers in the fleet and elsewhere may find these books of interest in their professional reading.

The inclusion of a book in this section does not necessarily constitute an endorsement by the Naval War College of the facts, opinions or concepts contained therein.

Many of these publications may be found in ship and station libraries. Certain of the books on the list which are not available from these sources may be available from one of the Navy's Auxiliary Library Service Collections. These collections of books are obtainable on loan. Requests from individual officers to borrow books from an Auxiliary Library Service Collection should be addressed to the nearest of the following special loan collections.

Chief of Naval Personnel (G14)
Department of the Navy
Washington, D.C. 20370

Commanding Officer
U.S. Naval Station
Library (ALSC), Bldg. C-9
Norfolk, Virginia 23511

Commanding Officer
U.S. Naval Station
Library (ALSC)
San Diego, California 92136

Commanding Officer
U.S. Naval Station (Pearl Harbor)
Library (ALSC) Box 20
San Francisco, California 96610

Commanding Officer
U.S. Naval Station (Guam)
Library (ALSC) Box 174
San Francisco, California 96630

BOOKS

Beaufre, d'Armee André. *An Introduction to Strategy*. New York: Praeger, 1965. 138 p.

The title *An Introduction to Strategy* implies the book to be a basic approach to a complicated subject–couched in simple terms and explanations. This is definitely not the case. The author has prepared a highly detailed, comprehensive, and carefully formulated treatise on strategy and his work is literally an all-inclusive textbook on this particular branch of knowledge.

General Beaufre devotes the initial chapter of his endeavor to a general survey of the word "strategy"–initially analyzing the meaning, aims, and patterns of strategy and then dividing the word and its meaning into subdivisions of action. He concludes his first chapter by reviewing basic principles of strategy and their application. Chapter Two concerns itself with traditional "military strategy" and its relationship to military operations. The author next turns to strategy in the nuclear age and Chapter Three is a highly interesting and thought-provoking discussion of the importance and originality of the nuclear weapon, forms of nuclear strategy, and the continuing evolution of strategy in the nuclear age. His points are liberally and interestingly illustrated through firsthand intimate knowledge of political and military events over the past two decades.

Chapter Four devotes itself to the concept of "indirect" strategy and the counters available to such strategy. The author also points out the imperative need for the Free World to understand and exploit the indirect concept if it hopes to survive.

General Beaufre concludes his excellent text with a series of general thoughts on strategy–stressing that if Free World strategy is to become master of such new phenomena as the cold war, total war, and nuclear war that it must undergo considerable change; that it must be widened in scope and fundamentally revised.

A. E. DEWACHTER
Commander, U.S. Navy

Brown, Neville. *Nuclear War.* London: Praeger, 1964. 227 p.

The author, a research associate at the Institute for Strategic Studies in London, has presented an interesting and helpful work for both the layman and the military professional. It is an orderly development of the available tools of war and the current strategies governing their use. It contains excellent descriptions of current weapons and their capabilities. The technology and effects of nuclear weapons are outlined in comparatively understandable terms. A comparison is made of the complete gamut of Soviet and Western bloc weapons. The book would be of value as an unclassified source of information and comparative statistics if there was nothing else in it.

In addition, however, the author discusses current Soviet and Western doctrine and goes into detail concerning the strategies and relative strengths and weaknesses of NATO and the Soviet bloc. He outlines the basic difference between Western and Soviet thinking with regard to the control possible in a modern conflict. He traces the changes in Western thinking and the resulting "Forward Strategy" adopted by NATO. He compares not only the major powers forces but includes the smaller powers capabilities and contribution. He also discusses the possibilities and probabilities of direct confrontation on the NATO flanks.

After the careful and factual preparation offered the reader, Mr. Brown then discusses his ideas of some of the problems involved in the present NATO strategy as he envisions it in actual execution. He then offers his ideas as to how it could be improved. The reader may or may not agree with the author's ideas but the exposure to them is both educational and worth the effort involved.

H. L. WARREN
Lieutenant Colonel, U.S. Air Force

Kissinger, Henry A. *The Troubled Partnership.* New York: McGraw-Hill, 1965. 266 p.

This book grew out of a series of lectures delivered at the Council of Foreign Relations in March 1964. It focuses attention upon the structural problems of the Atlantic Alliance, by pointing out the changes that have occurred in the basic nature of alliances. Mr. Kissinger says that the deepest problem before NATO is that the pressures of technology run counter to the traditional notions of sovereignty. He examines the nature of the strategic debate

now in progress with a constructive critical analysis of the flaws of the United States. It serves as a gentle but firm reminder that the United States cannot rest on the theoretical adequacy of its views. Part one of the book is the most thought-provoking because it lays the foundation for a much-needed rebuilding of United States policy toward the Atlantic community. The political issues which Mr. Kissinger believes to be the root problems, are exemplified by the competition between the United States and France. He gives strong indications that the differences are not all the fault of Charles de Gaulle. The following quote may help clarify the issues between the United States and De Gaulle. It may also have an impact upon those who have tried to reconcile the inconsistent turns of United States policy from one part of the world to another.

> "In the emerging areas the nation-state was treated as natural, and in Eastern Europe great hope was placed in nationalism as a counterweight to communism. But in Western Europe, where the concept of nationalism had originated, American policy decried the nation-state as outdated and backward."

Mr. Kissinger reminds the reader that United States policy has been to foster political unity (federation) of the Western European nation-states through promotion of economic integration; and since it has become clear that such a hope was unduly optimistic, American policy has been at odds with itself and at times appears to be seeking a scapegoat to blame for this frustration. He drives home the point that even if a political united Europe were to be achieved, it would inevitably dissipate American hegemony in Atlantic policy. The United States may not be entirely satisfied with such a turn of events, nor even come to recognize that it may be the price of European unity. For the issue of political control of nuclear weapons is not likely to be resolved by a United Europe any more than by the MLF. Mr. Kissinger sees East-West relations and the future of Germany as the chief factor in the question of what kind of Atlantic partnership we should have in the future.

G. J. PATTON
Commander, U.S. Navy

London, Kurt. *The Making of Foreign Policy*. Philadelphia: Lippincott, 1965. 358 p.

In *The Making of Foreign Policy*, author London has updated, reevaluated, and in large measure rewritten his earlier (1949) text of foreign policy, *How Foreign Policy Is Made*. After summarizing significant characteristics of the current international environment and reviewing the limitations created by the various elements of national power, Mr. London discusses the internal factors which contribute to foreign policy making. He believes that for most of the major nations of the world–domestic and foreign policies have today become inseparable, and present a most interesting analysis of the manner in which national institutions and traditions in these nations affect their foreign policy decisions, and of the conflicting pressures exerted from within by competing interest groups.

Much of the remainder of the book constitutes a short course in comparative government, with particular attention being paid to the organizations and procedures involved in the formulation and execution of foreign policy decisions by the leading nations of both East and West. Relations between individual countries and the United Nations are also discussed. *The Making of Foreign Policy* is recommended to the beginning student of national strategy formulation as a readable review of the factors involved, and to those interested in contemporary international affairs as a concise comparative summary of the conduct of foreign relations by today's major powers.

H. T. QUINN, JR.
Commander, U.S. Navy

Marshall, Charles B. *The Exercise of Sovereignty*. Baltimore: The Johns Hopkins Press, 1965. 275 p.

In this book, which includes a Foreword by Dean Acheson, Mr. Marshall has assembled selections from his own essays and lectures from his past twelve years of experience in foreign affairs. He has chosen as his connective theme the sovereignty of contemporary nation-states, with emphasis on the world as it exists rather than the world as it ought to be. The selections are divided into three broad categories: The conditions of foreign policy between sovereign states, alliance and confrontation between them and relations with new states.

In the author's words this is "a book on ways of thinking about foreign policy, more than on events."

Mr. Marshall take a practical if somewhat pessimistic approach to the problems of diplomacy in assuring the reader that there will always be trouble between sovereign states. The best that enlightened diplomacy can hope to achieve is a minimization or perhaps a deflection of the difficulties encountered to keep them within manageable bounds. The book is alive with frequent illustrative examples from recent diplomatic incidents and is made entertainingly readable by the author's expressive style. It is recommended reading and will provide additional insight for the student of international relations.

G. C. BALL, JR.
Captain, U.S. Navy

Stanley, Timothy W. *NATO in Transition: the Future of the Atlantic Alliance.* New York: Praeger, 1965. 406 p.

Timothy Stanley has rendered in this book an incisive, well-rounded study of the North Atlantic Treaty Organization. Writing from a background of intensive research, government service, and earlier duty as a military officer deployed with a unit assigned to NATO, the author provides a comprehensive overview of the cultural, economic, political and military aspects of the Atlantic alliance. His searching examinations and analyses are well reasoned and highly informative of the several critical problem areas which currently plague the NATO leadership. Especially instructive are his extensively documented surveys and discussions of the strategic factors, weapons criteria, and political schism tendency factors which vitally influence the NATO environment. The Treaty Organization is depicted as being in a state of transition; at a point in its evolution where its original mission of maintaining the security and political integrity of its member nations must be expanded to include the development of means which look toward the establishment of a peaceful world order. Mr. Stanley chronicles the already substantial and lasting achievements of the NATO alliance, and sets forth cogent, convincing arguments for maintaining and strengthening it. In this latter connection, he imparts a sense of urgency to the need for member nations to find early resolutions of their differences in order that the alliance can move forward constructively. Of special interest to professional military and naval officers, this book will, in addition, prove to Americans

in every walk of life enlightening in a subject which embraces what may well be the single most important political development subsequent to World War II: NATO.

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